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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20555

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of:

Implementation of Sections of the  
Cable Television Consumer Protection  
and Competition Act of 1992; Rate  
Regulation

and

Adoption of a Uniform Accounting  
System for Provision of Regulated  
Cable Service

MM Docket No. 93-215

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CS Docket No. 94-28

PETITION BY THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY  
FOR PARTIAL RECONSIDERATION OF SECOND REPORT AND ORDER

For months, the Commission has recognized the need to harmonize regulations applicable to local exchange carriers ("LECs") and cable operators because of imminent and significant entry by LECs and cable operators into each other's core market. But the agency has repeatedly delayed this necessary task with the promise to align its LEC and cable operator regulatory policies at some unspecified time in the future. The Second Report and Order in these dockets is the latest example:

"[O]ur rules regarding allocation [by cable operators] of costs associated with services not subject to cable rate regulation are likely to be revisited in the near future in light of developing circumstances, including in particular the convergence of the telephone and cable industries."<sup>1/</sup>

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<sup>1/</sup> Second Cable TV Cost Order at ¶121, FCC 95-502 (rel. Jan. 26, 1996). See also, id. at ¶188 ("we will resolve all outstanding issues concerning [cable system] network upgrades . . . at a later time").

This delay at regulatory harmonization should end. Disparate regulation of major competitors hurts consumers by harming competitors. Moreover, the Telecommunications Act of 1996 recognizes that LECs and cable operators will enter each other's core market in a significant way within the next few months via networks specially designed to provide both telephony and cable service, and the Act makes plain that Congress expects the Commission to facilitate this entry.<sup>2/</sup>

Not only should the Commission conform rules applicable to cable operators and LECs due to imminent competition between LECs and cable operators, it also should harmonize these rules where possible based on the present record in these proceedings rather than by issuing new notices of proposed rulemaking calling for

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<sup>2/</sup> See, e.g., H.R. Conf. Rep. No. 458, 104th Cong., 2d. Sess. 173 (1996) (prohibiting FCC from requiring LECs to get agency authorization under Section 214 of Communications Act before deploying cable TV facilities because requiring such authorization has been "an obstacle to competitive entry" into the video market by LECs). In Connecticut, cable operators serving more than half the state's population already have begun network upgrades that will allow them to provide telephone exchange service and improved cable service, and their telephony affiliates have obtained certificates from the Department of Public Utility Control ("DPUC") to provide such service. In addition, the DPUC has adopted regulations to facilitate cable operator provision of telephony, including regulations requiring SNET to (a) resell exchange service at a cost-based price, (b) provide mutual compensation for call termination, (c) unbundle exchange service into separate switching and transmission offerings, and (d) provide telephone number portability. These DPUC regulations are described in detail in the "Petition of Southern New England Telecommunications Corporation for Declaratory Ruling" at 17-25 (CCBP01 96-03, filed Jan. 17, 1996). SNET likewise is in the midst of spending \$4.5 billion to upgrade its network in order to provide both cable service and improved telephony throughout Connecticut, and SNET's cable TV affiliate has filed an application with the DPUC for a statewide franchise to provide cable service via this upgraded network.

additional comments on harmonization proposals. Acting on the basis of the present record rather than a new notice of rulemaking is advantageous because it conserves Commission resources and permits speedier decision making.

In light of the need for rapid decisions to conform regulations applicable to LECs and cable operators, SNET requests below that the Commission reconsider its action in the Second Report and Order in one respect. Specifically, we ask the agency to amend the cable operator affiliate transaction rule considered there in order to state specifically that a price-cap-regulated cable operator may provide network transmission service to its telephony affiliate only at a price which is set by allocating costs in compliance with the cost allocation principles set forth in the agency's cable TV rules. As we will show, this amendment not only is consistent with the record in these proceedings, it also is required by law.

#### DISCUSSION

The affiliate transaction rule can have an important impact on the terms under which a LEC or cable operator enters the other entity's core market through a network designed to provide both telephony and cable service. The rule has this important impact because it defines circumstances in which the price of affiliate transactions is regulated.

Unfortunately, the affiliate transaction rule applicable to LECs is different on its face in one important respect from the affiliate transaction rule applicable to cable operators. The LEC rule regulates the price a LEC charges its cable affiliate for

using the LEC's network on a non-common carrier basis to provide cable service by requiring that costs be allocated in accordance with specific principles.<sup>3/</sup> This requirement applies regardless of whether the LEC's telephony rates are set by cost-of-service regulation or by price cap regulation. By contrast, the cable operator affiliate transaction rule regulates the price a cable operator charges its affiliate to use its network to provide telephony if that cable operator's cable TV rates are subject to cost-of-service regulation.<sup>4/</sup> But the cable TV rule does not make clear that the price charged by price-cap-regulated cable operators for such network transmission service also is regulated. Cable rates of the overwhelming majority of cable operators are subject to price cap regulation.

The record in these proceedings provides an adequate basis to amend the cable operator affiliate transaction rule in order to make clear that the price charged by a price-cap-regulated cable operator to its telephony affiliate for network transmission service will be set in compliance with the existing cost allocation rules applicable to cable operators. In the notice of proposed

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<sup>3/</sup> See 47 C.F.R. §§32.27(d) ("When a . . . [LEC] provides substantially all of a service to . . . an affiliate which . . . [is] not also provided to unaffiliated persons or entities, the service shall be recorded at cost . . . [in accordance with cost allocation principles set forth in Section 64.901(b) of the Rules]").

<sup>4/</sup> See 47 C.F.R. §76.924(i)(4) and (5) (making plain that a cost-of-service-regulated cable operator may provide telecommunications service to its telephony affiliate only at a price established by allocating costs in accordance with Section 76.922 and Sections 76.924(b) and (d)).

rulemaking that led to adoption of the Second Report and Order, the Commission asked whether it should conform its cable affiliate transaction rule to the rule applicable to LECs.<sup>5/</sup> Several commenters urged the agency to do so.<sup>6/</sup> The cable industry itself effectively admitted that the Commission should regulate the price at which a price-cap-regulated cable operator provides network capacity to its telephony affiliate by arguing that price-regulation of an affiliate transaction is justified when it involves "customized or specialized . . . services."<sup>7/</sup> A cable operator which allows its affiliate to use the operator's cable network to provide telephony obviously is engaged in a transaction involving "customized or specialized services".<sup>8/</sup>

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<sup>5/</sup> Further Notice of Proposed Rulemaking, 9 FCC Rcd. 4527, 4683-86 (1994); see also, Second Report and Order at ¶133 (stating that this Further Notice had asked "whether the cable services affiliate transaction rule should conform with the affiliate transaction rule being considered with regard to common carriers").

<sup>6/</sup> See, e.g., Comments of Bell Atlantic at 10 (July 11, 1994) (urging Commission to require that price-cap-regulated cable operators comply with the same affiliate transaction requirements as price-cap regulated LECs).

<sup>7/</sup> See Comments of TCI at 47 (July 1, 1994). See also Reply Comments of Comcast at 16-17 (Aug. 1, 1994).

<sup>8/</sup> Rather than conform the cable operator and LEC affiliate transaction rules by amending the cable operator rule to make plain that price-cap-regulated cable operators must provide their telephony affiliates with network capacity at a regulated price, the Commission instead could conform the rules by amending the LEC rule to eliminate price regulation of the LEC's provision of network capacity to its cable TV affiliate. While SNET would prefer this latter approach to conform the rules, amending the LEC rule is beyond the scope of the present proceedings since these proceedings involve amendments to regulations applicable to cable operators.

Not only does the record justify applying identical regulations to set the price at which cable operators and LECs provide network transmission service to an affiliate for provision of telephony and cable service respectively, applying disparate regulations would be unlawful. The D.C. Circuit has reminded the Commission of "the importance of [either] treating similarly situated parties alike or providing an adequate justification for disparate treatment."<sup>9/</sup> Moreover, the Commission must do more than enumerate factual differences; it must "explain the relevance of those differences to the purposes of the . . . Communications Act."<sup>10/</sup> In the Second Report and Order, the Commission failed to provide any justification for disparate treatment of LECs and cable operators in this situation.

#### CONCLUSION

The Commission should amend the affiliate transaction rule applicable to cable operators in order to make clear that a price-cap-regulated cable operator providing network capacity to its telephony affiliate must set the price of such capacity by allocating costs in accordance with the cost allocation principles contained in the cable TV rules. Amending the rule in this manner would conform that rule to the affiliate transaction rule already applicable to LECs. That rule already requires a LEC subject to

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<sup>9/</sup> McElroy Electronics Corp. v. FCC, 990 F.2d 1351, 1365 (D.C. Cir. 1993).

<sup>10/</sup> Adams Telecom., Inc. v. FCC, 38 F.3d 576, 581 (D.C. Cir. 1995) (quoting Melody Music, Inc. v. FCC, 345 F.2d 730, 733 (D.C. Cir. 1965)).

price cap regulation to set the price of network capacity for an affiliate providing cable service by allocating costs in accordance with the cost allocation principles contained in the LEC rules. The proposed amendment also is consistent with the Commission's own request for comments in the notice that led to the Second Report and Order about whether to conform the cable operator affiliate transaction rule to the LEC rule. Finally, the amendment is required by law since there is no rational way to justify requiring a LEC to provide network capacity to its cable affiliate at a regulated price while not imposing the same requirement on a cable operator which provides network capacity to its telephony affiliate.

Respectfully submitted,

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